EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 8000082/2024

Held in Glasgow on 5-6 August 2024
Deliberations on 9 August 2024

Employment Judge Sangster
Tribunal Member J McElwee
Tribunal Member S Singh

Mr F Lubamba	**Claimant** **In Person**
A1 Jobs Limited	**Respondent** **Represented by:** **Mr L Fakunle - Solicitor**
Sash Time Limited	**Respondent** **Represented by:** **Mr L Fakunle - Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous judgment of the Tribunal is that the claimant's complaints of direct race discrimination, harassment related to race, victimisation and detriment/dismissal as a result of making a protected disclosure do not succeed and are dismissed.

REASONS

Introduction

1. The claimant presented complaints under the Equality Act 2010 (EqA) of direct race discrimination, harassment related to race, victimisation, as well

as complaints under the Employment Rights Act 1996 (ERA) of detriment/dismissal as a result of making a protected disclosure.

2. The respondents resisted the complaints.

3. The parties lodged an agreed bundle of documents extending to 156 pages. A further document, extending to 4 pages, was added with consent during the hearing.

4. The claimant was assisted by an interpreter during the hearing.

5. The claimant gave evidence on his own behalf.

6. The respondents led evidence from:

   a. Mohammad Yousuf Sinclair (**MS**), currently (from May 2024) Warehouse Manager for the Second Respondent, formerly Operations Manager; and

   b. Alan Kenny (**AK**), Chief Executive Officer of the First Respondent.

Issues to be Determined

7. A list of issues had been prepared by the respondents and provided to the claimant for consideration. This was discussed at the commencement of the hearing. The list of issues then agreed was as follows:

Direct Race Discrimination – s13 EqA

8. Did the Second Respondent do the following things:

   a. On 11 December 2023 the claimant was required by the supervisor James to work outside all day in the cold from 9am to 5pm. Some black workers and two white Scottish workers worked outside with the claimant, but they all did so for less than an hour.

   b. On 14 December 2023 the claimant was required by the supervisor James to work outside in the cold from 9am to about 3pm after which he was required to work in the depot. When the claimant was outside, he was working on his own.

c. On 15 December 2023 the claimant was required by the supervisor James to work outside in the cold from 9am until about 4pm. The claimant worked outside on his own until early afternoon when another black worker joined the claimant and they worked together.

9. Was that less favourable treatment? The Tribunal will decide whether the claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and the claimant's. If there was nobody in the same circumstances as the claimant, the Tribunal will decide whether he was treated worse than someone else would have been treated. The claimant has not named anyone in particular who he says was treated better than he was.

10. If so, was it because of race?

Harassment Related to Race - s26 EqA

11. Did the Second Respondent do the following:

a. On each of 11, 14 and 15 December 2023 a manager of the second respondent called the claimant and other black workers "unskilled". The claimant did not know the name of the manager as the claimant was new to working there. The manager had more authority than James. He was the manager who had authority over the warehouse. He was the manager in charge of the warehouse.

12. If so, was that unwanted conduct?

13. If so, did it relate to race?

14. Did the conduct have the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant? If not, did it have that effect? The Tribunal will take into account the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

Victimisation – s27 EqA

15. Did the claimant do a protected act? The claimant relies upon the terms of his email to the First Respondent dated 19 December 2023.

16. Did the First Respondent subject the claimant to a detriment by dismissing him or indicating to him that he would not be offered any further work?

17. If so, was this because the claimant did a protected act?

Protected Disclosure – s43B ERA

18. Has the claimant made a qualifying disclosure, as defined in section 43B ERA? The claimant relies upon the terms of his email to the First Respondent dated 19 December 2023. The Tribunal will decide:

    a. Did the claimant disclose information?

    b. Did the claimant believe the disclosure of information was made in the public interest?

    c. Was that belief reasonable?

    d. Did the claimant believe it tended to show that the health or safety of any individual had been, was being or was likely to be endangered, or that a person had failed, was failing or was likely to fail to comply with any legal obligation?

    e. Was that belief reasonable?

19. If the claimant made a qualifying disclosure, was it also a protected disclosure?

Detriment – s47B ERA

20. Did the claimant suffer a detriment on the ground that he made a protected disclosure pursuant to section 47B ERA? The detriment relied upon by the claimant is being informed that the First Respondent would no longer offer any work to him.

Unfair Dismissal – s103A ERA

21. Was the claimant an employee?

22. If so, was the claimant dismissed on/around 19 December 2023?

23. If so, was the sole or principal reason for the dismissal the fact the claimant made a protected disclosure(s) in terms of section 103A ERA

Remedy

24. If any of the claimant's complaints succeed, what remedy is appropriate?

Findings in Fact

25. This Judgment does not seek to address every point about which the parties have disagreed. It only deals with the points which are relevant to the issues which the Tribunal must consider in order to decide if the claim succeeds or fails. If a particular point is not mentioned, it does not mean that it has been overlooked, it simply means that it is not relevant to the issues to be determined. The relevant facts, which the Tribunal found to be admitted or proven, are set out below.

26. The Second Respondent is an online retailer. They have around 17 permanent employees. The Warehouse Manager is ultimately responsible for the operations within the warehouse. The Warehouse Supervisor reports to the Warehouse Manager and is assisted by a Warehouse Assistant. The remaining permanent employees are Warehouse Operatives who are trained and experienced in picking and packing. December is a particularly busy period for the Second Respondent. Agency staff are brought in to assist with the temporary increase in demand. The Second Respondent has a contract with the First Respondent (a temporary work agency/employment business) to facilitate this. In December 2023, in addition to permanent employees, the respondent would have around 15-20 agency workers on a daily basis.

27. On any given day, the Second Respondent has a number of workers working outside, in the vicinity of the warehouse. Outside work includes:

a. Unloading stock from containers which have arrived from China. It would take 6-8 workers around 3-4 hours to unload each container;

b. Loading products which have been picked and packed to fulfil orders from individual consumers, onto courier vehicles. It takes 2 workers around 30 minutes to load each courier vehicle. In December 2023 there were 4 courier uplifts each day from the Second Respondent's warehouse; and

c. Cardboard/packaging cutting and the disposal into skips in the yard, which is an ongoing and continuous task, given the nature of the Second Respondent's business. At least one worker would be assigned to this task continuously, with others assisting when they were not engaged in other tasks.

28. At the start of December 2023, the claimant responded to an advertisement placed by the First Respondent for individuals to provide temporary work to the Second Respondent as Warehouse Operatives.

29. Following discussions with AK, the claimant entered into a contract for services with the First Respondent. He was informed by text on 6 December 2023 that he should start working for the Second Respondent on a temporary basis the next day, and that shifts were 9am to 5pm, Monday to Friday.

30. The claimant attended the Second Respondent's warehouse on Thursday 7 December 2023, along with a number of other agency workers. His work that day comprised of an induction.

31. The claimant did not attend for work with the Second Respondent on Friday 8 December 2023.

32. The claimant arrived for work late on Monday 11 December 2023, arriving at around 09:28. The majority of tasks had already been allocated when he arrived. The claimant was directed that he should deal with cardboard disposal that day. He was informed that a colleague would show him what to do. That colleague remained with him for two hours, before leaving to undertake other duties. The claimant remained in the yard, dealing with

cardboard disposal all day. He was assisted by other colleagues at various points throughout the day: initially by two white Scottish workers and latterly by 5 black workers. They did so in between other tasks allocated to them, for around one hour and few hours respectively.

33. The claimant did not attend for work with the Second Respondent on either Tuesday 12 or Wednesday 13 December 2023.

34. Shortly after 9am on Thursday 14 December 2023, the Second Respondent contacted the First Respondent to indicate that the claimant had not arrived for work. AK contacted the claimant by text at 09.17, stating *'Just to confirm if you do not get yourself to work today, you wont have a job to go back to. I have 10 people lined up who are desperate for work. So if you don't want to work, its not a problem I'll replace you with someone who does. If you do want to work then great. Get to work and text me when you arrive'*. AK then sent a further text asking if the claimant was going into work. The claimant responded stating that he was, and had just borrowed his brother's bus ticket to enable him to do so.

35. As the claimant arrived at the respondent's premises well after the stated start time of his shift, he was informed that he would require to wait to start at 11am, when the next shift commenced. That shift consisted of experienced warehouse operatives, whose duties included picking and packing. At the commencement of the shift the claimant was again asked to undertake cardboard disposal in the yard, as all other ad hoc tasks had been allocated when the first shift commenced at 9am. He did so until 6pm that day. He was assisted by another colleague for around 4 hours.

36. The respondent had two containers arrive that day, at 9am and 1pm. Accordingly, throughout that day the Second Respondent generally had 9-12 workers working outside: 6-8 offloading the containers, 2 loading courier vehicles and 1-2 dealing with cardboard disposal.

37. The claimant arrived on time on Friday 15 December 2023. He conducted cardboard disposal in the yard until around 4pm, then undertook duties in the

warehouse. A further container arrived that day and required to be offloaded by the Second Respondent's workers.

38. The claimant did not attend for work on Monday 18 or Tuesday 19 December 2023.

39. Shortly after 9am on 19 December 2023 the Second Respondent's Warehouse Manager contacted AK to indicated that the claimant had not arrived for his shift, and they did not wish him to return to work for them. AK understood they had run out of patience as a result of the claimant's unreliable attendance. Given how busy they were at that time of the year, they required someone who would attend for their agreed shifts.

40. At 09:23 on 19 December 2023, AK sent texts to the claimant stating *'Why are you not at work?'* and *'Call me as soon as you see this message.'*

41. The claimant did not call AK, in response to his texts. AK attempted to phone the claimant at around 09:25, but the claimant did not answer. AK left a voicemail for the claimant indicating that he should not return to the Second Respondent's warehouse, and would not be offered any further work by the First Respondent. The claimant did not however listen to this voicemail, as he had insufficient credit on his mobile phone account to do so.

42. At 10:27 that morning, the claimant sent an email to AK stating *'I worked 5 shifts at G52 4JW. I have been cutting cardboard all day shift and putting it outdoor bins for all day shift. While doing that, some of their managers calling your workers "un-skills"; such insult in workplace is not acceptable and mount as bullying in a workplace and it is against the law here in the UK. I got cold because I worked all day long outdoor of the warehouse. My GP told me that I can re start my work tomorrow 20/12/2023. Please make your contractor to show a little respect to their workers even they are unskills like they said; which is questionable'*

43. AK attempted to call the claimant again, on receipt of that email. Again, the claimant did not answer his call. AK then sent him a text message, at 10:56 stating, *'Francois. I don't understand why you can't answer your phone when*

I try call. Especially after you haven't turned up for work. You are no longer required back to work. You will be paid for what you worked.'

44. In response to that text, the claimant sent a further email to the First Respondent, at 11:04, stating that he was considering taking legal action against them and the Second Respondent. AK responded at 11:48, reiterating that the claimant would not be offered any further work by the First Respondent.

Submissions

45. The respondent submitted, in summary, that:

a. The claimant's email dated 19 December 2023 did not constitute a qualifying disclosure;

b. Tasks were allocated to the claimant due to him arriving late, when other tasks had been allocated, not because of his race; and

c. The claimant has not satisfied the burden of proof in relation to his asserted complaints of harassment.

46. The claimant, in summary, submitted that:

a. He did not understand, from the advert and induction, that the role could involve working outside. He felt singled out, because of his race, when he was asked by the Second Respondent to work outside; and

b. He informed the First Respondent of his ill treatment. They retaliated by stating that he would not be offered any further work.

Relevant Law

Direct Discrimination

47. Section 13(1) EqA states:

'A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.'

48. The basic question in a direct discrimination case is: what are the grounds or reasons for treatment complained of? In ***Amnesty International v Ahmed*** [2009] IRLR 884 the EAT recognised two different approaches from two House of Lords authorities - (i) in ***James v Eastleigh Borough Council*** [1990] IRLR 288 and (ii) in ***Nagaragan v London Regional Transport*** [1999] IRLR 572. In some cases, such as ***James***, the grounds or reason for the treatment complained of is inherent in the act itself. In other cases, such as ***Nagaragan***, the act complained of is not inherently discriminatory but is rendered so by discriminatory motivation, being the mental processes (whether conscious or unconscious) which led the alleged discriminator to act in the way that he or she did. The intention is irrelevant once unlawful discrimination is made out. That approach was endorsed in ***R (on the application of E) v Governing Body of the Jewish Free School and another*** [2009] UKSC 15.

49. The Tribunal should draw appropriate inferences from the conduct of the alleged discriminator and the surrounding circumstances (with the assistance, where necessary, of the burden of proof provisions), as explained in the Court of Appeal case of ***Anya v University of Oxford*** [2001] IRLR 377.

50. In ***Shamoon v Chief Constable of the RUC*** [2003] IRLR 285, a House of Lords authority, Lord Nichols said that it was not always necessary to adopt a sequential approach to the questions of whether the claimant had been treated less favourably than the comparator and, if so, why. Instead, they may wish to concentrate initially on why the claimant was treated as they were, leaving the less favourable treatment issue until after they have decided on the reason why the claimant was treated as they were. What was the employer's conscious or subconscious reason for the treatment? Was it because of a protected characteristic, or was it for some other reason?

51. For direct discrimination to occur, the relevant protected characteristic needs to be a cause of the less favourable treatment 'but does not need to be the only or even the main cause' (paragraph 3.11, ***EHRC: Code of Practice on Employment (2011)***). The protected characteristic does however require to

have a 'significant influence on the outcome' (***Nagarajan v London Regional Transport*** 1999 ICR 877).

Harassment

52. Section 26 EqA states:

'(1) A person (A) harasses another (B) if—

(a) A engages in unwanted conduct related to a relevant protected characteristic, and

(b) the conduct has the purpose or effect of—

(i) violating B's dignity, or

(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.'

(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—

(a) the perception of B;

(b) the other circumstances of the case;

(c) whether it is reasonable for the conduct to have that effect.'

53. There are accordingly 3 essential elements of harassment claim under section 26(1), namely (i) unwanted conduct, (ii) which relates to a relevant protected characteristic and (iii) that has the proscribed purpose or effect.

Victimisation

54. Section 27 EqA states:

'(1) A person (A) victimises another person (B) if A subjects B to a detriment because-

(a) B does a protected act, or

(b) A believes that B has done, or may do, a protected act.

(2) Each of the following is a protected act-

(a) bringing proceedings under this Act;

(b) giving evidence or information in connection with proceedings under this Act;

(c) doing any other thing for the purposes of or in connection with this Act;

(d) making an allegation (whether or not express) that A or another person has contravened this Act.'

Burden of proof

55. Section 136 EqA provides:

'If there are facts from which the tribunal could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned the tribunal must hold that the contravention occurred. But this provision does not apply if A shows that A did not contravene the provision.'

56. There is accordingly a two-stage process in applying the burden of proof provisions in discrimination cases, explained in the authorities of ***Igen v Wong*** [2005] IRLR 258, and ***Madarassy v Nomura International Plc*** [2007] IRLR 246, both from the Court of Appeal. The claimant must first establish a first base or prima facie case of direct discrimination or harassment by reference to the facts made out. If the claimant does so, the burden of proof shifts to the respondent at the second stage to prove that they did not commit those unlawful acts. If the second stage is reached and the respondent's explanation is inadequate, it is necessary for the Tribunal to conclude that the complaint should be upheld. If the explanation is adequate, that conclusion is not reached.

57. In ***Madarassy,*** it was held that the burden of proof does not shift to the employer simply by a claimant establishing that they have a protected characteristic and that there was a difference in treatment. Those facts only indicate the possibility of discrimination. They are not, of themselves,

sufficient material on which the tribunal 'could conclude' that, on a balance of probabilities, the respondent had committed an unlawful act of discrimination. The Tribunal has, at the first stage, no regard to evidence as to the respondent's explanation for its conduct, but the Tribunal must have regard to all other evidence relevant to the question of whether the alleged unlawful act occurred, it being immaterial whether the evidence is adduced by the claimant or the respondent, or whether it supports or contradicts the claimant's case, as explained in ***Laing v Manchester City Council*** [2006] IRLR 748, an EAT authority approved by the Court of Appeal in ***Madarassy.***

Protected Disclosure

58. Section 43A ERA provides:

"In this Act a 'protected disclosure' means a qualifying disclosure (as defined by section 43B) which is made by a worker in accordance with any of sections 43C to 43H."

59. A qualifying disclosure is defined in section 43B ERA as *"any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following:*

a. *That a criminal offence has been committed, is being committed or is likely to be committed;*

b. *That a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject;*

c. *That a miscarriage of justice has occurred, is occurring or is likely to occur;*

d. *That the health or safety of any individual has been, is being or is likely to be endangered;*

e. *That the environment has been, is being or is likely to be damaged; or*

f. That information tending to show any matter falling within any one of the preceding paragraphs has been, or is likely to be deliberately concealed."

60. In ***Kilraine v London Borough of Wandsworth*** [2018] EWCA Civ 1436, at paragraphs 35 and 36, the Court of Appeal set out guidance on whether a particular statement should be regarded as a qualifying disclosure:

"35. The question in each case in relation to section 43B(1) (as it stood prior to amendment in 2013) is whether a particular statement or disclosure is a 'disclosure of information which, in the reasonable belief of the worker making the disclosure, tends to show one or more of the matters set out in sub-paragraphs (a) to (f).' Grammatically, the word 'information' has to be read with the qualifying phrase 'which tends to show [etc]' (as, for example, in the present case, information which tends to show 'that a person has failed or is likely to fail to comply with any legal obligation to which he is subject'). In order for a statement or disclosure to be a qualifying disclosure according to this language, it has to have a sufficient factual content and specificity such as is capable of tending to show one of the matters listed in subsection (1)."

"36. Whether an identified statement or disclosure in any particular case does meet that standard will be a matter for evaluative judgment by a tribunal in light of all the facts of the case. It is a question which is likely to be closely aligned with the other requirement set out in section 43B(1), namely that the worker making the disclosure should have the reasonable belief that the information he discloses does tend to show one of the listed matters. As explained by Underhill J in Chesterton Global at [8], this has both a subjective and an objective element. If the worker subjectively believes that the information he discloses does tend to show one of the listed matters, and the statement or disclosure he makes has a sufficient factual content and specificity such that it is capable of tending to show that listed matter, it is likely that his belief will be a reasonable belief."

61. In ***Simpson v Cantor Fitzgerald Europe*** [2020] ICR 236, the EAT confirmed these principles, stating:

> *'43... As the Court of Appeal in Kilraine v Wandsworth London Borough Council [2018] ICR 1850 made abundantly clear, in order for a statement or disclosure to be a qualifying disclosure, it has to have sufficient factual content and specificity such as is capable of tending to show breach of a legal obligation.*
>
> *69. The tribunal is thus bound to consider the content of the disclosure to see if it meets the threshold level of sufficiency in terms of factual content and specificity before it could conclude that the belief was a reasonable one. That is another way of stating that the belief must be based on reasonable grounds. As already stated above, it is not enough merely for the employee to rely upon an assertion of his subjective belief that the information tends to show a breach.'*

Detriment Claim – Protected Disclosures

62. Section 47B ERA states that

> *'A worker has the right not to be subjected to any detriment by any act, or deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure.'*

63. In ***Shamoon v Chief Constable of the Royal Ulster Constabulary*** [2003] IRLR 285 confirms that a worker suffers a detriment if a reasonable worker would or might take the view that they have been disadvantaged in the circumstances in which they had to work. An 'unjustified sense of grievance' is not enough.

64. Whether a detriment is 'on the ground' that a worker has made a protected disclosure involves consideration of the mental processes (conscious or unconscious) of the employer acting as it did. It is not sufficient for the Tribunal to simply find that 'but for' the disclosure, the employer's act or omission would not have taken place, or that the detriment is related to the disclosure. Rather, the protected disclosure must materially influence (in the sense of it being

more than a trivial influence) the employer's treatment of the whistleblower (***Fecitt and others v NHS Manchester*** [2012] IRLR 64).

65. Helpful guidance on the approach to be taken by a Tribunal when considering claims of this nature is provided in the decision of Blackbay Ventures Ltd (t/a Chemistree) v Gahir [2014] IRLR 416 at paragraph 98.

Automatically Unfair Dismissal – Protected Disclosures

66. Section 103A ERA states that:

'An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or if more than one the principal reason) for the dismissal is that the employee made a protected disclosure.'

67. In ***Fecitt and others v NHS Manchester,*** the Court of Appeal held that the causation test for unfair dismissal is stricter than that for unlawful detriment under s47B ERA: s103A ERA requires the disclosure to be the primary motivation for a dismissal.

Discussion & Decision

Direct Discrimination

68. The Tribunal considered the allegation of direct discrimination, considering whether the alleged treatment occurred, whether it amounted to less favourable treatment and, if so, what the reason for that treatment was: was it because of race?

69. The Tribunal accepted that the claimant was asked to work outside, but did not accept that this was less favourable treatment. All of the Second Respondent's workers could be required to do so, with 12 or more working outside at some points during each day in December 2023 – around a third of the respondent's total workforce at that time. Other workers were required to work outside all day, just not in the same area as the claimant. They could be unloading containers all day, helping with cardboard disposal, loading courier vehicles, or any combination of these. The claimant had no visibility on what others were doing when he was dealing with cardboard disposal.

70. In any event, the Tribunal determined that the claimant was asked to deal with cardboard disposal on 11 and 14 December 2023 as he arrived late on each of those dates and other tasks had already been allocated. He was asked to do so on 15 December 2023 as that was the only task he had undertaken, he was proficient in doing so and had not raised any concerns with the Second Respondent in relation to this. The claimant was not asked to deal with cardboard disposal because of race. His complaint of direct race discrimination does not therefore succeed and is dismissed.

Harassment

71. The Tribunal then considered the allegation of harassment, considering whether there was unwanted conduct and, if so, whether that was related to race and had the proscribed purpose or effect.

72. The claimant's complaint to the Tribunal was that a manager of the Second Respondent called the claimant and other black workers unskilled. That differed from the complaint he raised in his email to AK on 19 December 2023, as set out in paragraph 42 above. In that email the claimant stated that a manager of the Second Respondent referred to 'your workers' (i.e. the workers supplied by the First Respondent) as 'un-skills'. He complained that that amounted to an 'insult', 'bullying' and demonstrated 'little respect' to workers. He did not state that the comment was only made to black workers, or that making the comment amounted to race discrimination. The Tribunal concluded that there would have been some reference to these points if the comment had indeed only been directed at black workers. The Tribunal accepted that a manager of the Second Respondent may have referred to the agency workers supplied by the First Respondent as unskilled. That comment was directed at all of the agency workers, who were not trained or experienced in picking and packing in the Second Respondent's workplace. It was not directed solely to black workers as the claimant now asserts. Accordingly, whilst it may have been unwanted conduct, it was not related to race. The claim of harassment in relation to this accordingly does not succeed and is dismissed.

Victimisation

73. The claimant relied upon his email of 19 December 2023 as constituting a protected act. As set out in paragraph 72 above however, the claimant did not make any assertions that there had been a contravention of the Equality Act 2010 in his email. He made no reference to race whatsoever. In these circumstances the Tribunal concluded that the terms of the claimant's email did not constitute a protected act. As there was no protected act, the complaint of victimisation cannot succeed and is dismissed.

Protected Disclosure

74. The Tribunal then considered each of whether the email of 19 December 2023 was a qualifying disclosure and, if so, whether it was also a protected disclosure. The Tribunal was mindful that five questions require to be considered in determining whether an asserted disclosure amounted to a qualifying disclosure. The Tribunal noted that, unless all five conditions are satisfied, there will not be a qualifying disclosure.

75. The Tribunal noted that there were two elements to the claimant's email of 19 December 2023: An assertion that managers had called workers 'un-skills'; and a statement that the claimant *'got cold because [he] worked all day long outdoor of the warehouse'.* The Tribunal's conclusions in relation to each element are set out below:

    a. In relation to the first element, the Tribunal concluded that the claimant did disclose information, namely that some of the Second Respondent's managers were insulting the First Respondent's workers by calling them *'un-skills'.* The Tribunal found that the claimant believed that the information disclosed tended to show that a legal obligation had been breached: he stated in his email that such insults were not acceptable in the workplace and amounted to bullying which was *'against the law here in the UK'.* The Tribunal concluded, in the circumstances, that that belief was reasonably held. The Tribunal also accepted that the claimant believed that the information disclosed was made in the public interest (it related to all of the First Respondent's

workers) and that, in the circumstances, that belief was reasonably held. It was therefore a qualifying disclosure. Given that it was made to his employer, it was also a protected disclosure (the Protected Disclosure).

b. In relation to the second element, while the Tribunal concluded that the claimant did disclose some information: namely that he *'got cold because [he] worked all day long outdoor of the warehouse',* that information did not have sufficient factual content and specificity capable of tending to show that the health and safety of any individual had been, was being, or was likely to be, endangered, or that a person had failed, was failing or was likely to fail to comply with a legal obligation. Many people work outside all day. Without further information, the information disclosed does not meet the threshold level of sufficiency in terms of factual content and specificity, such as was capable of tending to show that the health and safety of any individual had been, was being, or was likely to be, endangered, or that legal obligations were being breached. In these circumstances, the Tribunal concluded that the claimant did not believe that the information disclosed tended to show a relevant failure (as set out in s43B ERA). If he did, that belief was not reasonable. Further, the Tribunal did not accept that the claimant believed that the limited information disclosed was made in the public interest (it related only to him), or that any such belief which he did have was reasonably held. The Tribunal accordingly concluded that this did not amount to a qualifying disclosure.

Detriment/Unfair Dismissal – s47B/103A ERA

76. Having reached the conclusion that the claimant made a protected disclosure, the Tribunal then considered whether claimant was subjected to a detriment (being informed that he would no longer be offered work) on the ground that he made the protected disclosure. Alternatively, was the protected disclosure the sole or principal reason for any dismissal? The Tribunal found that the answer to both questions is no. As set out in paragraphs 39-42 above, the

Second Respondent informed the First Respondent that they did not want the claimant to return to their premises just after 9am on 19 December 2023. The First Respondent determined, on receipt of that information, that they would not offer any further work to the claimant. AK attempted to call the claimant at around 09:25 on 19 December 2023 to inform him of this. The claimant did not answer, so AK left a voicemail for the claimant indicating that he should not return to the Second Respondent's warehouse, and would not be offered any further work by the First Respondent. This was all before the protected disclosure was made in the claimant's email at 10:27 later that day. The protected disclosure could not have influenced those decisions in any way, as it had not yet been made. The complaints of detriment and automatically unfair dismissal, contrary to sections 47B and 103A ERA, accordingly do not succeed and are dismissed.

Employment Judge: **Sangster**
Date of Judgment: **29 August 2024**
Entered in register: **30 August 2024**
and copied to parties